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No. 80-1887

In the Supreme Court of the United States

OCTOBER TERM, 1980

CLYDE K. THOMPSON, PETITIONER

v.

VERNE ORR, SECRETARY OF THE UNITED STATES AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner brought this action for injunctive relief and damages under 42 U.S.C. 1983 and the Administrative Procedure Act, 5 U.S.C. 702, against various federal and state officials associated with the operation of the Utah Air National Guard, challenging his separation from service as an officer of the Guard and the resulting termination of his full-time civilian employment as a technician with the Guard. Petitioner was discharged from the Guard pursuant to Air National Guard selective retention procedures

which dictate that officers with 20 or more years of service be separated unless their retention is recommended by an Advisory Board after completion of an annual review. The district court granted respondents' motion for summary judgment, concluding that "there is no substantial indication of arbitrary, capricious, or illegal conduct * * *" (Pet. App. A-4, A-7).

The court of appeals affirmed (Pet. App. A-8 to A-13). The court held that the Utah Air National Guard had complied with all applicable regulations in the proceedings resulting in petitioner's separation and that the decision to separate petitioner from his military status was neither arbitrary nor capricious (*id.* at A-10). The court also held that petitioner had not been denied due process by the Guard's failure to afford him an evidentiary hearing prior to his separation, noting that the discretionary military decision was not subject to judicial review and that the termination of civilian employment resulting from the military decision was required by statute (*id.* at A-11 to A-13).[1]

2. a. Further review of petitioner's claim is unwarranted. This Court has consistently declined to review discretionary personnel decisions of the military. *Reaves* v. *Ainsworth*, 219 U.S. 296, 304-306 (1911); *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953). See also *Rostker* v. *Goldberg*, No. 80-251 (June 25, 1981); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Gilligan* v. *Morgan*, 413 U.S. 1 (1973). Underlying these decisions is the principle that the primary business of the military is the public defense and "[t]he responsibility for determining how best our

[1] The court of appeals observed, however, that petitioner "had been advised that the Board would meet and review his status" and that "[h]e was told that he could submit a statement if he wished, but he did not do so" (Pet. App. A-10).

Armed Forces shall attend to that business rests with Congress * * * and with the President." *Schlesinger* v. *Ballard*, *supra*, 419 U.S. at 510.

The court of appeals correctly applied this principle to the present case. Selective retention decisions are made to insure the vitality of the National Guard, by preventing a loss of combat readiness stemming from retention of those not essential to the unit. Air National Guard Regulation ("A.N.G.R.") 36-06 (Pet. App. A-18). As the court below observed, "[w]hether an officer should be retained which in turn is based on how much the unit needs him is well within the realm of purely military decisions which are not reviewable" (*id.* at A-13). See *Mindes* v. *Seaman*, 453 F.2d 197, 201 (5th Cir. 1971).

b. Petitioner contends, however, that the Guard's failure to afford him an evidentiary hearing before terminating his military status constituted a denial of due process requiring judicial correction. This claim is insubstantial, because petitioner had no property interest in continued service with the Utah Air National Guard.[2] Under the applicable regulations, a Guard officer, such as petitioner, with 20 years of service must be separated unless his retention is affirmatively recommended by an Advisory Board

[2] In *Tennessee* v. *Dunlap*, 426 U.S. 312, 316 (1976), this Court held that 32 U.S.C. 709(e)(3), which provides for removal of a National Guard technician for cause, creates no basis for a due process claim by a person whose employment as a technician was automatically terminated under 32 U.S.C. 709(e)(1) by reason of his separation from military status. The Court declined to consider whether the Guard technician had a legitimate expectation of continued military status itself amounting to a property interest protected by due process, because the issue had not been properly preserved. 426 U.S. at 316 n.3.

after each annual review. A.N.G.R. 36-05, 36-06.[3] Under A.N.G.R. 36-06, the decision to retain an officer is entrusted to the discretion of the Adjutant General for the state involved, acting upon the recommendation of an Advisory Board (see Pet. App. A-18, A-24 to A-26). Thus, petitioner acquired no property interest in continued service. *Walker* v. *Alexander*, 569 F.2d 291, 293-294 (5th Cir. 1978); see *Board of Regents* v. *Roth*, 408 U.S. 564, 578 (1972).[4]

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[3] A.N.G.R. 36-05 provides, in pertinent part:

> All officers with 20 years of federal service qualifying for retirement pay (10 U.S.C. 1331) will be discharged unless recommended for retention by the appropriate board in accordance with A.N.G.R. 36-06.

[4] The cases cited by petitioner (Pet. 14-16) do not support his contention that an officer in the National Guard discharged under selective retention procedures has a property interest in continued military service. The courts in *NeSmith* v. *Fulton*, 615 F.2d 196 (5th Cir. 1980), and *Turner* v. *Egan*, 358 F. Supp. 560 (D. Alas.) (three-judge court), aff'd, 414 U.S. 1105 (1973), held that separations from military service and termination of employment of National Guard officers are discretionary military decisions not subject to judicial review. Several of the other cases cited by petitioner involved members of the military who, in view of the nature of their particular positions, had a legitimate expectation of continued military employment. *Buchanan* v. *United States*, 621 F.2d 373 (Ct. Cl. 1980) (officer in Navy reserve training program who could not be separated except for cause entitled to hearing prior to termination); *Bollen* v. *National Guard Bureau*, 449 F. Supp. 343, 346-347 (W.D. Pa. 1978) (National Guard officer had property interest in continued employment conferred by letter from Air National Guard Bureau which indicated that he would be exempt from selective retention procedures); *Rolles* v. *Civil Service Commission*, 512 F.2d 1319, 1327 (D.C. Cir. 1975) (civilian employee of Air Force

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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who could be removed only "for cause" (5 U.S.C. 7501) had a legitimate claim of entitlement to continued employment).

Petitioner's reliance (Pet. 10-13) on various statutes and regulations to support his expectation of continued military retention is misplaced. Contrary to petitioner's assertion (*id.* at 11), neither 32 U.S.C. 307(a) nor 32 U.S.C. 323(a) provides that an officer of the Air National Guard is entitled to retain "his commission and his recognition unless he fails to maintain the physical and mental qualifications required of his office." Nor does Utah state law recognize an officer's right to continued commission absent "cause" for removal. Utah Code Ann. § 39-1-30 (1953 repl.) provides that all officers of the National Guard are subject to separation by "reason of resignation, disability, *or for other causes to be determined by a court-martial or other legally organized Board convened for that purpose*" (emphasis added).

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